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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

NO. 313

LONE STAR GAS COMPANY,
Appellant

versus

STATE OF TEXAS, ET AL.,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEES' MOTION TO DISMISS APPEAL

WILLIAM MCCRAW,
Attorney General of Texas
ALFRED M. SCOTT,
Assistant Attorney General
EDWARD H. LANGE,
Laredo, Texas
Attorneys for Appellees.

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To the Honorable Supreme Court of the United States:

Appellees move that this appeal be dismissed, as having been improvidently granted, for the following reason:

PROPOSITION:

THIS COURT HAS NO JURISDICTION OF THIS CAUSE FOR THE REASON THAT THE

APPEAL WAS TAKEN SOLELY FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS (AN INTERMEDIATE APPELLATE COURT) AND FROM THE FINAL JUDGMENT OF JULY 10, 1935, RENDERED BY SAID COURT, AND NOT FROM THE SUPREME COURT OF TEXAS (THE HIGHEST COURT OF THE STATE) OR FROM THE JUDGMENT OF SAID HIGHEST COURT, DATED OCTOBER 7, 1936, REFUSING WRIT OF ERROR AND THUS AFFIRMING ON ITS MERITS, WITHOUT OPINION, THE JUDGMENT OF THE COURT OF CIVIL APPEALS; AND THE APPEAL, THEREFORE, HAS NOT BEEN TAKEN FROM THE FINAL JUDGMENT OF THE "HIGHEST COURT OF A STATE IN WHICH A DECISION IN THE SUIT COULD BE HAD," AND WAS ACTUALLY HAD IN THIS CASE, AS PROVIDED BY SEC. 237 OF THE JUDICIAL CODE, U. S. C. TITLE 28, SEC. 344 (a).

The Court of Civil Appeals entered its judgment of reversal and rendition on July 10, 1935. (R. V, 3370). In due time the Company filed in the Court of Civil Appeals its motion for rehearing (R. V, 3371-3405), which motion was overruled on September 25, 1935, with supplemental opinion (R. V, 3405-3406). Thereupon within the time prescribed by the applicable statute the Company filed in the Court of Civil Appeals, as prescribed by the statutes, its application for writ of error; which application, together with the entire record in the cause and certified

copies of the orders entered by the Court of Civil Appeals, were transmitted to and filed in the Supreme Court of Texas on November 2, 1935, (R. V, 3407-3435). The Supreme Court of Texas on October 7, 1936, entered its order, "that the application be refused." (R .V, 3435). Thereafter within due time, and on October 22, 1936, the Company filed in the Supreme Court of Texas, and that Court overruled, its motion for rehearing. (R. V, 3456).

On February 9, 1937, the Company presented its petition for appeal (from the State Court to this Court) to Hon. Jas. W. McClendon, Chief Justice of the Court of Civil Appeals, praying for an order granting leave to appeal to this Court from the final judgment of the Court of Civil Appeals, and not from the final judgment of the Supreme Court of Texas. That petition for appeal was denied by the Chief Justice of the Court of Civil Appeals (R. V, 3457-3458).

Thereupon, and on February 12, 1937, the Company presented to Hon. Benjamin N. Cardozo, Associate Justice of this Court, assigned to the Fifth Circuit, its petition for leave to appeal to this Court from the said final judgment of the Court of Civil Appeals, of July 10, 1935 (R. V, 3457), which appeal was granted on the same date (R. V, 3468). Throughout said petition for appeal, assignment of errors and prayer for reversal accompanying same, (R. V, 3458) the Company sought to appeal from, and assigned errors in, and prayed for reversal of,

the final judgment of the Court of Civil Appeals only, and not that of the Supreme Court of Texas.

At page 1 of its printed jurisdictional statement, filed in this Court pursuant to Rule 12, the Company describes the judgment appealed from as being the final judgment of the Court of Civil Appeals, and this description is repeated on page 5, where the facts are affirmatively recited, showing the filing of the application and the refusal thereof by the Supreme Court of Texas. And throughout said jurisdictional statement it is made plain that the final judgment sought to be appealed from and reviewed is that of the Court of Civil Appeals and not that of the Supreme Court of Texas.

Appellant does not show that it has, and as an actual fact it has not, presented its petition for leave to appeal, from the final judgment of the Supreme Court of Texas as aforesaid, to the Presiding, or any, Justice of the Supreme Court of Texas, nor to any Justice of this Court, as prescribed by the applicable federal statutes and rules governing this Court's jurisdiction, and the procedure, in appeals from State Courts.

ARGUMENT

Section 237 of the Judicial Code, as amended, (U.S.C. Title 28, Sec. 344-a) provides that: "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had . . . may be reviewed by the Supreme Court."

This Court has held that where the state court of last resort is vested with appellate jurisdiction to review the judgment of an intermediate, appellate court, and the state court of last resort has declined to grant the appellate writ, this Court will accept the interpretation of the state court of last resort as to whether the denial of the appellate writ amounts to a total refusal to exercise any jurisdiction upon the merits at all, or whether it constitutes in effect an actual exercise of active appellate jurisdiction and is tantamount to an affirmance of the intermediate appellate court's judgment without written opinion. In the latter situation (which we say is presented by this appeal and record) the appeal properly lies from the judgment of the state court of last resort, and not from the judgment of the intermediate appellate court.

Norfolk & Southern Turnpike Co. v. Virginia, 225 U. S. 264, 267-269, 56 L. Ed. 1082;
F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 413, 64 L. Ed. 989;
Hetrick v. Lindsey, Ohio, 265 U. S. 384, 386, 68 L. Ed. 1065;
Matthews v. Huwe, 269 U. S. 262-266, 70 L. Ed. 266;
Tumey v. State of Ohio, 273 U. S. 510, 515, 71 L. Ed. 749;
Van Huffel v. Harkelrode, 284 U. S. 225, 230, 231, 76 L. Ed. 256;
Whitfield v. Ohio, 297 U. S. 431, 435, 80 L. Ed. 778, 782.

Article 1728, Revised Civil Statutes of Texas, 1925, fixes and defines the appellate jurisdiction of

the Supreme Court of Texas. The pertinent parts thereof, applicable here, are quoted in the margin.[1]

Other statutory articles pertaining to the practice of applying for writ of error, which is the exclusive applicable statutory mode of removing causes from the Court of Civil Appeals to the Supreme Court of Texas, are quoted in the margin also.[2]

The Supreme Court of Texas has held, in *Gammel Statesman Pub. Co.* v. *Ben C. Jones & Co.*, 206 S. W. 931, that the refusal of a writ of error by the Supreme Court of Texas, *as in this case*, necessarily

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[1] "Appellate jurisdiction—The Supreme Court shall have appellate jurisdiction coextensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from final judgment of trial courts:

1. * * *
2. * * *
3. Those involving the construction or validity of statutes necessary to a determination of the case.
4. * * *
5. Those in which the Railroad Commission is a party.
6. * * *

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall *refuse* the application; and in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall *dismiss the case for want of jurisdiction.*"

[2] " 'Art. 1729—Writ of error or certificate.—All causes mentioned in the preceding Article (1728) may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals. * * *'

" 'Art. 1740.—Petition of writ of error.—A writ of error before the Supreme Court may be applied for by petition addressed to said Court and the petition shall contain such other requisites as may be prescribed by the Supreme Court; * * *

" 'Art. 1742.—Filing.—The petition shall be filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing'."

volves and constitutes a consideration of the cause on its merits by the Supreme Court of Texas, and an actual exercise of active jurisdiction by that urt, and an affirmance by that Court, upon its erits, of the judgment of the Court of Civil Appals, even though no opinion be written, and even ough the legal effect of the refusal is not exessly recited in or written into the order refusing e application for writ of error; so that by virtue erely of the refusal of the application, the opinion d judgment of the Court of Civil Appeals become ose of the Supreme Court of Texas by adoption, d subject to its protection and enforcement by propriate process.

The holding of the above cited case is expressly nfirmed by statutory enactment, contained in ragraph 6 of Article 1728, quoted in footnote 1, pra, as follows: "In all cases where the judgment the Court of Civil Appeals is a correct one and here the principles of law declared in the opinion the Court are correctly determined, the Supreme urt shall *refuse* the application."

It is even apparent from Appellant's own motion r re-hearing on its application for writ of error the Supreme Court of Texas, R. V. 3444, that it, pellant, clearly acknowledged the taking of juris-

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206 S. W. p. 932. "The motion in the case before us was filed and d upon by the Court of Civil Appeals after the Supreme Court had sed a writ of error in said cause, and by such action *affirmed* the inal judgment of the Court of Civil Appeals and that of the trial t."

diction of the cause by the Supreme Court of Texas, in the overruling of appellant's several assignments of error embraced in the said application.'

We think there cannot be the slightest doubt, that if an appeal could have been prosecuted to this Court at all by the Company in this case, it would, under the mandatory, clear, and inexorable provisions of Section 237 of the Federal Judicial Code, have had to be prosecuted from the final judgment of the Supreme Court of Texas affirming upon its merits without opinion the judgment and opinion of the Court of Civil Appeals, and not from the judgment of the Court of Civil Appeals itself.

In the case of *Adam* v. *Saenger* (No. 197, October Term, 1937)—U. S.—, recently decided by this Court, the appeal was correctly taken from the Court of Civil Appeals of Texas, because the Supreme Court of Texas in that case, "*dismissed the case for want of jurisdiction,*" as provided for in that part of paragraph 6 of Art. 1728 (Footnote 1, supra), reading as follows:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the

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' Appellant's motion for re-hearing of application for Writ of Error to the Supreme Court of Texas, R. V., 3436. . . :

"Twenty-fourth Assignment of Error.

"This Honorable Court erred in overruling the Seventeenth Assignment of Error presented in the application for Writ of Error *and in thereby holding* that the judgment of the Court of Civil Appeals approving and holding valid the rate prescribed in the order of the Railroad Commission did not take defendant's property without due process of law." . . . R. V., 3444.

> opinion of the Court of Civil Appeals in all respect has correctly declared the law, it shall *dismiss the case for want of jurisdiction.*"

This question has been briefed somewhat more in detail on both sides in No. 13, October Term, 1937, *United Gas Pub. Serv. Co., Appellant*, v. *State of Texas, et al, Appellees* (No. 807, Oct. Term, 1936), in which case this Court, as we conceive, erroneously overruled our motion to dismiss upon the grounds here urged, doubtless through a failure to understand, from our imperfect presentation, the state practice, statutes, and decisions.

We are fully aware that the Court has, in several instances, retained jurisdiction of appeals prosecuted from our Courts of Civil Appeals in the circumstances here involved, but we think the Court has clearly but inadvertently fallen into error in so doing, and that its error was probably due to a failure of the parties litigant heretofore to make plain to this Court the state law applicable.

As the matter now stands, the rule observed by this Court in appeals from Texas is in direct conflict with its rule observed in appeals from the State of Ohio, and perhaps other states, where the state practice, so far as material to this question, is identical with that in Texas. There certainly should be uniformity, and not conflict, in the application of the jurisdictional statute governing appeals to this Court from the state courts.

For the Court's convenience we attach as an Ap-

pendix hereto a copy of the entire opinion and certificates of the Supreme Court of Texas in the case of *Gammel Statesman Pub. Co.* v. *Ben C. Jones & Co.*, 206 S. W. 931, *supra*.

We, therefore, respectfully urge the Court to reconsider this question and to dismiss the appeal as not having been prosecuted from "the highest court of a state in which a decision of the suit could be had."

Respectfully submitted,

WILLIAM MCCRAW,
Attorney General of Texas
ALFRED M. SCOTT,
Assistant Attorney General
EDWARD H. LANGE,
Laredo, Texas
Attorneys for Appellees.

APPENDIX "A"

Commission of Appeals
Section A
No. 9

The Gammel Statesman Publishing Co., et al.,
Plaintiffs in Error,
vs.
Ben C. Jones & Co.,
Defendants in Error.

From Travis Co.
3rd Dist.

The judgment of the trial court in this cause was affirmed by the Court of Civil Appeals for the Third Supreme Judicial District on May 24, 1911. 141 S. W., 1048. On June 6, 1911, defendants in error filed their original motion for rehearing in said cause. The court adjourned without acting on this motion, but over-ruled same at its next term on December 6, 1911. On January 4, 1912, defendants in error filed their application for writ of error to the Supreme Court and the same was denied on February 7, 1912. On February 24, 1912, defendants in error filed in the Supreme Court their motion for rehearing on the refusal of their application for writ of error and said motion was over-ruled on February 28, 1912. On March 25, 1912, defendants in error filed in the Supreme Court an application for mandamus against the judges of the Court of Civil Appeals for the Third Supreme Judicial District to require the latter court to grant a rehearing and

reopen the case, and this was refused on April 3, 1912. Defendants in error next filed in the Supreme Court an application for mandamus against the Judge of the Trial Court and same was refused. On May 28, 1912, defendants in error filed in the Court of Civil Appeals a motion styled "motion to vacate judgment." This motion was refused by the court on October 12, 1912. On October 23, 1912, defendants in error filed in the Court of Civil Appeals what they termed "motion for rehearing of motion to vacate judgment" and this was over-ruled on January 8, 1913. On January 15, 1913, defendants in error filed in the Court of Civil Appeals a motion designated "supplemental motion for rehearing of motion to vacate judgment". The Court of Civil Appeals on February 19, 1913 granted this motion and entered judgment, setting aside its former judgment rendered May 24, 1911, affirming the judgment of the District Court and all other orders and decisions made by it subsequent to that time and reversed and remanded the cause for a new trial.

Plaintiffs in error contend that said court was without authority to grant the motion, because same was filed and acted upon at a subsequent term of the court to that at which its original judgment was rendered and after the Supreme Court had denied a writ of error in said cause. This is the only question presented for review.

We conclude, after a careful examination of the motion in connection with the record, that while not

so designated, it is in substance a motion for rehearing within the meaning of that term as used in articles 1633 and 1641, Revised Statutes, 1911. The Court of Civil Appeals so held in granting the motion. 156 S. W., 317.

The motion was not filed within the time allowed for the filing of motions for rehearing and was not acted upon at the term of the court at which the original judgment was rendered. This being true, the court was without authority to take any action on the motion and the judgment entered granting the motion and setting aside and vacating the original judgment rendered by said court in said cause and reversing and remanding the case to the trial court, must, we think, be held to be void and of no effect. Articles 1633 and 1641, R.S. 1911. McGhee v. Romatka, 92 Texas, 241. The original judgment of affirmance stands just as if the motion had not been filed.

It is contended that under the holding in the case of McGhee v. Romatka, supra, this court is without jurisdiction to review the action of the Court of Civil Appeals in granting the motion.

The motion in the case before us was filed and acted upon by the Court of Civil Appeals after the Supreme Court had refused a writ of error in said cause and by such action affirmed the original judgment of the Court of Civil Appeals and that of the trial court. The judgment of the Court of Civil

Appeals entered in granting the motion not only set aside and vacated its judgment rendered at a former term, but also in effect set aside and vacated the judgment of the Supreme Court in denying the writ of error in said cause. It is well settled that when the jurisdiction of the Supreme Court attaches, the court has full control of the cause and can make such orders concerning it as may be necessary to preserve the rights of the parties and enforce its mandates. Its jurisdiction continues until the case is fully determined by the court and its judgment is completely executed by the court below. For the purpose of enforcing its mandates, it may make any order and, if necessary, may resort to the writ of mandamus or any other appropriate writ known to our system of jurisprudence. Wells v. Littlefield, 62 Texas, 28. The action of the Supreme Court in refusing a writ of error in this cause was binding on the Court of Civil Appeals. The Court of Civil Appeals at the time the motion under review was filed and acted upon was without jurisdiction of the case and had no power to enter any order or judgment therein. To hold otherwise would be to deny to the Supreme Court its power as a court of last resort. The question of the power of the Supreme Court to enforce its own jurisdiction was not before the court in the case of McGhee v. Romatka.

We are of opinion that the motion to dismiss the application for writ of error should be overruled and that the order and judgment entered by the Court of Civil Appeals setting aside and vacating its former

judgment and reversing and remanding the cause for a new trial should be held to be void and of no effect.

Strong

Judge.

The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the question discussed.

Nelson Phillips

Chief Justice.

December 11th, 1918.

(ENDORSED)

No. 9 COMMISSION OF APPEALS Section A. No. 2572 The Gammel Statesman Publishing Company, et al., Plaintiffs in Error v. Ben C. Jones & Co., Defendant in Error. OPINION. Order of Crt. of Civ. App. vacating its original judgment remanding the cause to the Dist. Crt. is reversed and the cause is remanded to the Crt. of Civ. App. for the execution of its original judgment. Filed in Supreme Court Dec'r. 11, 1918. F. T. Connerly, Clk. by H. L. Clamp, Deputy.

Strong, Judge.